

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Glen R. Posusta and Clint Herbst,

Complainants,  
vs.

ORDER OF DISMISSAL

Susie Wojchowski and Fred Patch,

Respondents.

On October 19, 2006, Glen R. Posusta and Clint Herbst filed a Complaint with the Office of Administrative Hearings alleging violation of Minn. Stat. §§ 211B.04 and 211B.06 by Susie Wojchowski and Fred Patch. Ms. Wojchowski is a candidate for the City Council in Monticello. The Chief Administrative Law Judge assigned this matter to the undersigned Administrative Law Judge (ALJ) on October 19, 2006, pursuant to Minn. Stat. § 211B.33.<sup>1</sup> A copy of the Complaint and attachments were sent by United States mail to the Respondents on October 19, 2006.

After reviewing the Complaint and attachments, the Administrative Law Judge finds that the Complaint does not state a prima facie violation of Minn. Stat. § 211B.04 or 211B.06.

Based upon the Complaint and the supporting filings and for the reasons set out in the attached Memorandum,

**IT IS ORDERED:**

1. That the Complaint filed by Glen R. Posusta and Clint Herbst against Susie Wojchowski and Fred Patch for violation of Minn. Stat. § 211B.06 is **DISMISSED WITHOUT PREJUDICE**. Complainants may file a subsequent complaint regarding alleged violations of Minn. Stat. § 211B.06 on or before November 6, 2006 without paying an additional filing fee.

2. That the Complaint that the flyer does not contain the disclaimer required by Minn. Stat. § 211B.04 is **DISMISSED**.

Dated: October 23, 2006

/s/Eric L. Lipman

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<sup>1</sup> The October 19, 2006 letter from the Office of Administrative Hearings stated that this case had been assigned to ALJ Barbara Neilson. This is incorrect. The case is assigned to ALJ Eric L. Lipman.

**NOTICE**

Under Minn. Stat. § 211B.36, subd. 5 this order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § 14.63 to 14.69.

**MEMORANDUM**

The Complaint alleges that by preparing and disseminating a flyer, in the form of a one-sided 8.5" x 11" page, Respondents intentionally violated Minn. Stat. § 211B.06. The Complaint also alleged that the flyer does not contain the disclaimer required by Minn. Stat. § 211B.04. The page, title "Re-elect the 'Good-ol-boys' to City Council?" contains 10 bullet point paragraphs. At the bottom of the page appears the following: "This is public information not paid for or endorsed by any candidate." The Complaint alleged that Fred Patch admitted that he created a document "similar" to the flyer and that he gave this item to Susie Wojchowski. The Complaint further alleges that the flyer was found in the door of an undetermined number of homes in the City of Monticello on October 14, 2006.

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

The term "reckless disregard" was added to the statute in 1998 to expressly incorporate the "actual malice" standard from *New York Times v. Sullivan*.<sup>2</sup> Based on this standard, the Complainants must show by clear and convincing evidence that the Respondents prepared or disseminated the flyer knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainants must allege that the Respondents "in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness" of its probable falsity.<sup>3</sup>

The Complainants have not alleged with any specificity what statements contained in the flyer are factually false. Neither have the Complainants alleged that Fred Patch or Susie Wojchowski participated in the preparation or dissemination of the flyer knowing it was false or doing so with reckless disregard of its falsity. A complaint alleging a violation of Minn. Stat. § 211B.06 must identify what statements are false and the knowledge or reckless disregard on the part of the person(s) who prepared or disseminated the campaign material.

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<sup>2</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>3</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) review denied (Minn. 2006).

For these reasons, the Complaint fails to identify a prima facie violation of Minn. Stat. § 211B.06 and therefore is dismissed without prejudice to re-filing. Complainants may re-file their complaint without payment of an additional filing fee if this subsequent complaint is filed on or before November 6, 2006.

The Complaint also alleges that the flyer does not contain the disclaimer required by Minn. Stat. 211B.04. On April 26, 2006, the Minnesota Court of Appeals issued its decision in *Riley v. Jankowski*,<sup>4</sup> holding that the disclaimer requirement of Minn. Stat. § 211B.04 violates the First Amendment of the U.S. Constitution. Because the Minnesota Court of Appeals has determined that Minn. Stat. § 211B.04 is unconstitutional on its face, it is not otherwise enforceable. The Complainant's allegation that Ms. Wojchowski and Mr. Patch violated Minn. Stat. § 211B.04 is dismissed.

**E.L.L.**

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<sup>4</sup> *Riley*, 713 N.W. 2d at 405.